THE SMALL BUSINESS NETWORK

May 29, 2019

Ex Parte

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: In the Matter of Leased Commercial Access Modernization of Media Regulation Initiative: MB Docket Nos. 07-42 and 17-105

Small Business Network ("SBN") has reviewed the pre-released Report and Order and Second Further Notice of Proposed Rulemaking in MB Docket No. 07-42 (May 16, 2018), and strongly urges the Commission not allow cable operators to abandon part-time leased access.

This proposed decision will, if adopted, destroy leased access programmers, like SBN, who cannot survive without the right to access cable channels on a part-time basis. In addition, this conclusion to discard the part-time programming requirement would depart from the Commission's understanding of the legislative history of Section 612 of the Act, would constitute Commission action outside of the range of issues addressed in the NPRM, and is otherwise based upon concerns that are unproven and not substantial, or that can be addressed without destroying the part-time leased access requirement.

SBN requests that the Commission consider the following and pull the item from the June 6, 2019 agenda.

1. Congress' Intent Behind the Leased Access Provision Cannot Be Realized Without Part-time Programmers and Most Leasing Is Part-time.

Congress created the leased access regime with the intention that leased access provide programmers with a "genuine outlet" for their product. *Implementation of Sections of the Cable Television and Consumer Protection and Competition Act of 1992 – Rate Regulation*, 8 FCC Rcd 5631, 5939 (1993). Leases can be for various lengths of time and for full and part-time channel use. The Commission in 1993 noted Congress' intent, found that the Act and its legislative history did not specify any particular terms and conditions for leasing, and concluded that "cable operators should be required to accommodate all such leases." Id at 5939, para. 498, n. 1277. This conclusion is not just "regulatory" (like a regulation based just on the public interest standard), but a decision which was necessary to implement the leased access statute.

Most leased access is part-time access. *Ex Parte Filing of NCTA* (Dec. 11, 2018) (MM Dkt. 07-42). This fact indicates that the marketplace for leasing has developed to favor part-time access, and that part-time access is the "genuine outlet" Congress sought to promote with the leased access statute. Indeed, the Leased Access Programmers Association informed the Commission that: "As has previously been noted, many programmers are small and have a limited amount of programming to present nor need or can afford a full-time channel. To eliminate part-time leased access would fly in the face of what Congress intended when they established such rules. Again the claims of a burden to cable operators to provide such are speculative and unsupported." *Ex parte, at 8 (Aug 13, 2018).*

2. <u>The Expressed Reasons for Eliminating Part-time Access Do Not Make Sense</u>.

The pre-released Report and Order would eliminate the part-time option based upon vague First Amendment concerns, and the costs imposed on cable operators.

Concerning costs, the pre-released Report and Order states the "the record indicates that those operators do not usually generate enough revenue from part-time leased access programming to cover the administrative costs of providing such programming." ¶17. The pre-released Report and Order relies upon this naked claim of the NCTA without examining cost data. Indeed, all the Commission has is a statement that there are costs without the types or more importantly, the amounts, identified. Worse, the answer to this problem – if it truly exists – is to revise the pricing rules in accordance with Section 612(c)(1) to cover these costs, not to throw out the part-time program.

"[P]ossible First Amendment concerns" cannot be used to ban part-time access while allowing full-time access to continue. There is no reasonable speech-related distinction between the two types of access. That there may be other ways for programmers to reach out to consumers that did not exist in 1992 may be true as mentioned by the pre-released Report and Order (¶17), but that fact is irrelevant as "'Leased access' was originally aimed at bringing about 'the widest possible diversity of information sources' <u>for cable subscribers</u>. *Time Warner Entertainment Co. v. FCC*, 93 F.3rd 957, 968 (1996) (para. 35). Section 612(a), 47 USC 532(a), provides that the purpose of the section includes assuring "that the widest possible diversity of information sources are available to the public from cable systems ...." This aim cannot be met by showing the programming anywhere but on a cable system. The legislation requiring leased access is content neutral. *Time Warner*, at 969. "Hence the standard must be intermediate scrutiny: it is enough if the government's interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim." *Time Warner*, at 969. The pre-released Report and Order does not explain how the part-time access channels do not meet the requirements of intermediate scrutiny.

3. <u>The NPRM did not give a hint that Commenters should be prepared to Defend the Existence of Part-time leased Access</u>.

The Administrative Procedure Act does not require the rulemaking action to be the one proposed in the NPRM; *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013); but, if not, it must be a logical outgrowth of the NPRM; *Covad Communications Co. v. FCC*, 450 F.3rd 528,548 (D.C. Cir. 2006). An NPRM satisfies the "logical outgrowth" test if it expressly asks for comments on a particular issue or makes it clear that the agency is contemplating a particular change. *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). In this case, the decision to end the part-time leased access program comes as a complete, unexpected shock. The NPRM raises the issue of part-time access in only one sentence suggesting merely modifying part-time leased access rules, not abandoning part-time leased access: "Should we adopt any new rules governing leased access rates or part-time leased access?" FCC 18-80, ¶24. After the pre-released Report and Order is adopted, there will be nothing "governing" part-time leased access. This one sentence on part-time leasing from the NPRM did not give the public adequate notice that the necks of the part-time programmers were on the chopping block.

4. The Pre-released Report and Order Violates the Regulatory Enforcement Act and Section 257 of the Communications Act.

The pre-released Report and Order does not address the effect of the abandonment of the part-time leasing regime on part-time programmers, most of whom (like SBN) are small businesses. This omission violated 5 USC 604.

Section 257 of the Communications Act requires the Commission to promote diversity of media voices and to identify and eliminate barriers to market entry for small businesses. The effect of the elimination of the regime on barriers to market entry by small businesses like SBN is not examined in the pre-released Report and Order.

5. At a Minimum, Existing Part-time Programming Arrangements Should Be Grandfathered and Renewable.

Part-time programmers such as SBN have invested their own money, and the time and effort of founders, to develop part time programming and to present it, all in reliance on a part-time program that has existed since 1996. This reliance interest should be considered, and existing arrangements should be grandfathered and renewable.

Respectfully submitted

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